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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 698.

WARNER COAL CORPORATION, DEBTOR,
Petitioner,

vs.

COSTANZO TRANSPORTATION COMPANY, *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT.

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Petitioner asks this Court to decide whether a debtor resisting involuntary bankruptcy proceedings can be denied the right to include his leasehold, machinery and equipment in his list of assets, merely because the lease gives the lessor the option, if bankruptcy be adjudicated, to cancel the lease and repossess the premises, including machinery and equipment. Petitioner further asks this Court to decide whether such provision in the lease deprives the debtor of his right to have his assets valued as those of a going concern. Finally, petitioner asks this Court to decide whether a debtor can be denied the right to have a jury find the fair value of his assets and determine whether his business is in fact a going concern.

Respondents' brief, ignoring the vital questions presented in our petition, relies on the fact that the debtor was short of cash and on the fact that its leasehold and machinery were carried on its books at less than fair value. Inability to meet current bills as they fall due is not the test of bankruptcy. It is equally well established that the debtor's book values of his assets are not controlling in bankruptcy proceedings.

The Sixth Circuit Court of Appeals in the case of *In re Nathanson Bros. Co.*, 64 F. (2d) 912, said:

> "We do not think that the financial outlook of the debtor corporation, or the intention of its stockholders and directors to continue business or liquidate at an early date, is determinative of the question. If the business is in fact being conducted at the time of alleged bankruptcy, then the items of property constituting its assets must receive a fair valuation, not as isolated articles separated from the whole, but as parts of the whole and as useful in that relationship. That is all that is meant by going concern value."

The Third Circuit Court of Appeals in the case of *Stitzer Hotel Co. v. Beyer, et al.*, 55 F. (2d) 620, said in the syllabus:

> "3. Mere fact that company's books show operating loss over period of time does not prove company 'insolvent' within Bankruptcy Act.
>
> 4. In determining whether company was 'insolvent' within Bankruptcy Act, fair value of all assets and capital of business must be considered."

RIGHT TO JURY FINDINGS.

Debtor in this case demanded a jury trial so that the questions of fact could be passed on by a jury. The opinion of respondents' counsel that debtor was not a going concern proves nothing. That was one of the important issues of fact that the jury should have passed on. Again, the fair valuation of debtor's property is a vital question of fact in involuntary bankruptcy proceedings. The jury should have been permitted to find it, allowing whatever reduction in value might be appropriate because of the terms of the lease. The Bankruptcy Act, Sec. 1 (19) provides that all of the debtor's property, but for the exception specifically mentioned and not applicable here, shall, at fair valuation, be matched against his debts to determine solvency.

Respondents' brief makes no comment on the most fundamental question of law raised in our petition for writ

of certiorari,—that the debtor is entitled to have the jury pass upon the issues of fact. The attempts to distinguish the facts in the instant case from those in the Fifth Circuit case of *Lasswell v. Stein-Block Co., et al.*, 93 F. (2d) 322 and those in *In re Nathanson Bros. Co.*, only emphasize the aptness of those cases and the clear conflict of law between this decision by the Fourth Circuit and the decisions of the Fifth and Sixth Circuits.

NOVEL QUESTIONS.

Novel questions of law not yet passed upon by the Supreme Court and concerning which the Circuit Courts are in conflict are presented in this case. As the bankruptcy laws affect all business there should be no doubt concerning the important question of what are assets to be included in determining solvency.

If the rule of law announced in this case by the Fourth Circuit is correct, that a debtor, occupying leased premises in which he has made improvements and wherein is located machinery to which he has an absolute title, may not count those assets in determining solvency in bankruptcy proceedings, then a radical departure has been made from generally accepted accounting practices. No longer will accountants be able to certify balance sheets of business establishments showing leasehold and machinery in the leased premises as assets, if the lease contains the common provision against bankruptcy found in this petitioner's lease.

We earnestly request this Court to grant a writ of certiorari to the Fourth Circuit Court of Appeals to the end that the judgment below may be reversed.

Respectfully submitted,

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